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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Case No. 2-11-bk-20426-BP

3 SMB GROUP, INC.

Debtor.

SMD GROUP INC

Plaintiff,

V.

RICHARD K. DIAMOND,

Defendant.

RICHARD K. DIAMOND

Counter Claimant.

V.

SMB GROUP, INC., as debtor
and debtor-in-possession

Counter Defendant

RICHARD K. DIAMOND
v.
Third Party Plaintiff,
IN CHUL SHIN, aka JEFF SHIN,
an individual; UNION TRIM,
INC.; USB GROUP, INC.; ALPHA
SEWING MACHINE,
Third Party Defendants

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

12 **PLEASE TAKE NOTICE**, that on April 10, 2013, at 2:00 p.m. in
13 Courtroom 1668 of the above entitled court, Counter Defendant SMB
14 Group, Inc. ("SMB") will, and hereby does move to dismiss the
15 Counter Complaint filed by Richard Diamond ("Diamond") against
16 SMB on the grounds that:

17 1. With respect to the first cause of action in the Counter
18 Complaint for fraud:

- 19 a. The cause of action fails to state a cognizable legal
20 theory;
21 b. The cause of action fails to allege sufficient facts to
22 assert a cognizable legal theory of fraud against SMB;
23 c. The cause of action fails to allege fraud with the
24 requisite specificity required by Rule 9 of the Federal
25 Rules of Civil Procedure ("FRCP") made applicable to
26 bankruptcy cases by Federal Rules of Bankruptcy
Procedure ("FRBP") Rule 7009; and

1 d. The cause of action fails to allege that Diamond
2 suffered any cognizable damages.

3 2. With respect to the second cause of action in the Counter
4 Complaint for negligence:

- 5 a. The cause of action fails to state a cognizable legal
6 theory;
- 7 b. The cause of action fails to allege sufficient facts to
8 assert a cognizable legal theory of negligence against
9 SMB;
- 10 c. The cause of action fails to allege a cognizable legal
11 duty owed by SMB to Diamond; and
- 12 d. The cause of action fails to allege that Diamond
13 suffered any cognizable damages.

14 3. With respect to the third cause of action in the Counter
15 Complaint for abuse of process:

- 16 a. The cause of action fails to state a cognizable legal
17 theory;
- 18 b. The cause of action fails to allege sufficient facts to
19 assert a cognizable legal theory of abuse of process
20 against SMB;
- 21 c. The cause of action fails to allege the existence of
22 any acts outside the scope of the proper legal process;
- 23 d. Any claim for abuse of process is time barred; and
- 24 e. The cause of action fails to allege that Diamond
25 suffered any cognizable damages.

26 The Motion will be based on this notice, the Memorandum of
27 Points and Authorities filed herewith, on all pleadings and
28 papers filed herein, and on such other and further evidence as

1 the Court may entertain at the time of the hearing of this
2 Motion.

3 DATED: March 14, 2013 LAW OFFICES OF DAVID A. TILEM
4

5 By: 

6 KEVIN S. LACEY
7 Attorneys for SMB GROUP, INC.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case has its genesis in a motion filed by SMB Group, Inc. ("SMB") against Richard Diamond ("Diamond") seeking damages for violation of the automatic stay (the "Motion"). The Motion was denied. Following an Appeal, the matter was remanded for an evidentiary hearing. Pursuant to the Mandate of the Bankruptcy Appellate Panel ("BAP"), as understood by the Court and SMB at a hearing conducted on December 5, 2012, SMB was directed to restate its claims by filing the Complaint in this case.

Diamond filed a combined Answer and Counter Complaint. In
the Answer portion of the document (at pages 2-6), Diamond denies
knowledge of virtually all factual allegation asserted in the
Complaint. In the Counter Claim portion of the same document (at
pages 16-24), Diamond asserts claims against SMB for fraud,
negligence and abuse of process which claims are based on the
very same facts which he professes not to know.

The BAP's Mandate was to conduct an evidentiary hearing on the issues asserted first in the Motion and now in the Complaint. At the December 5, 2012 hearing this Court made clear its desire to resolve the legal issues as expeditiously and efficiently as possible. The Counter Complaint asserts three entirely new and unrelated claims. Not only are those claims defective as a matter of law, but they appear to have been asserted solely to delay the case and increase SMB's litigation expense.

25 The first cause of action for fraud fails as a matter of law
26 because, among other things, it is not pled with the adequate
27 specificity required by FRCP Rule 9 and because Diamond has only
28 alleged potential and speculative damage.

The second cause of action for negligence fails as a matter of law as to SMB because, among other things, SMB owed no duty of care to Diamond, no such duty has been alleged and because, once again, Diamond has only alleged potential and speculative damage.

The third cause of action for abuse of process fails as a matter of law because, among other things, the elements of such a claim are not pled, the facts marshaled in support of such a claim do not establish such a claim and because any such claim is untimely as a matter of law.

Based on the foregoing, this Court should dismiss the Counter Complaint.

II. FACTUAL BACKGROUND

A. The Debtor & Related Entities

Plaintiff and Counter Defendant SMB was, prior to March 2011, in the business of performing "trim work" for the clothing industry.¹ The sole shareholder of SMB is Jeff Shin f/k/a In Chul Sin ("Shin"). (Complaint, ¶¶9,11; Counter Complaint, ¶127.) Shin is Korean and speaks very little English. SMB utilizes a fictitious business name, Union Trim.²

¹ "Trim work" consists of adding buttons, zippers, collars, pockets and other ornamental items to articles of clothing.

² There exists a validly formed and currently existing California corporation named Union Trim, Inc. ("UTI"). UTI has two shareholders: Shin and an unrelated person. UTI ceased operations several years ago and sold its assets, including the right to use the trade name "Union Trim", to SMB. UTI had not conducted any business for several years.

1 Shin is also the sole shareholder of USB Group, Inc.
2 ("USB"). (Complaint, ¶¶9, 11; Counter Complaint, ¶127.) Prior to
3 March 2011, USB was in the business of selling and repairing
4 commercial grade sewing machines and equipment. (Complaint, ¶13.)

5 USB and SMB are both located at 2635 S. Main Street in Los
6 Angeles. One of them operates from Unit "A" and the other from
7 Unit "B". Both Units have doors providing street access. The two
8 Units are separated by a demising wall but share a common office
9 in the center that has access to both Units.³ SMB conducts
10 business in the Northern Unit and USB in the Southern Unit.
11 (Complaint, ¶¶12, 15; Counter Complaint, ¶¶136, 150.)

12 Prior to June of 2010, USB borrowed \$250,000 from First Bank
13 to fund additional inventory. This loan was guaranteed by Shin.
14 The inventory line was later rewritten as a term loan and
15 documented in a Note dated June 25, 2010. When USB defaulted,
16 First Bank filed suit in Orange County Superior Court on February
17, 2011 and moved for a writ of possession on February 24, 2011.
18 The hearing date for First Bank's writ petition was March 25,
19 2011.

20 In search of an attorney, Shin consulted a popular Korean
21 newspaper and found an advertisement, partially written in
22 Korean, placed by the Law Offices of Gene W. Choe ("Choe"). Shin
23 met with Choe and a paralegal. Both suggested repeatedly that
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27 ³ This is most easily visualized as a basketball court where the
28 half-court line is a demising wall and the office is an enclosed
jump-ball circle at mid-court with doors to both halves of the
court.

1 Shin consider filing bankruptcy, but Shin refused. Shin told
2 Choe that he wanted to negotiate a payment schedule for the loan
3 with First Bank. Shin stated repeatedly that he did not want to
4 file any bankruptcy.

5 Shin retained Choe on behalf of USB. Choe had Shin sign
6 several documents written in English which were not translated
7 into Korean. Shin learned much later that Choe had Shin sign at
8 least one bankruptcy document called an "Electronic Filing
9 Declaration" (hereafter "EFD").

10 **B. Choe Files Unauthorized Bankruptcy Actions.**

11 On March 4, 2011, Choe, without Shin's consent or knowledge
12 and without the knowledge or consent of USB or UTI, Choe and his
13 office filed three (3) separate Chapter 7 bankruptcy cases: (1)
14 on behalf as Shin as an individual (2:11-bk-19485-PC); (2) on
15 behalf of UTI (2:11-bk-19513-BR) (case dismissed by Court Order
16 entered 7/21/2011); and on behalf of USB (2:11-bk-19514-PC) (case
17 dismissed by Court Order entered 5/31/2011).⁴ Choe was able to
18 accomplish this by utilizing the EFT which he had duped Shin into
19 signing.

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21
22 ⁴ In the Complaint, SMB alleges that Choe filed these petitions
23 using forged EFDs. (Complaint, ¶¶19, 30.) The evidence will show
24 that the Boards of Directors for USB and UTI were never consulted
25 and never authorized the petitions - there are no corporate
26 resolutions authorizing the petitions. The evidence will further
27 show that Shin never attended the pre-filing briefing required of
28 individual debtors. The certificate stating otherwise appears to
have been forged by Choe or a member of his staff. None of the
three petitions was personally signed. Finally, at least two of
the EFDs are photocopies and appear to have been altered by Choe
or a member of his staff after Shin signed it.

1 Diamond was appointed as the Chapter 7 trustee in both the
2 UTI and USB cases. (Complaint, ¶22; Counter Complaint, ¶¶139,
3 153.) It is important to observe that no case was, at that time,
4 filed for SMB. The petitions filed by Choe for USB and UTI
5 identified their places of business as 2635 S. Main Street, Los
6 Angeles. (Complaint, ¶12; Counter Complaint, ¶¶ 136, 150.)

7 On March 18, 2011, Diamond 's field representative, Kenneth
8 Roelke, was dispatched to the premises to close USB's business.
9 (Counter Complaint, ¶159.) According to the Counter Complaint,
10 Roelke was unable to ascertain which property at the location
11 might have been owned by USB or UTI - so Roelke, under color of
12 authority, ordered all occupants of the entire building to
13 immediately evacuate the property. He then seized the records
14 and sealed the property.⁵ (Counter Complaint, ¶159.)

15 **C. Diamond is Advised of the Facts and Takes no Action.**

16 Beginning April 6, 2011 and continuing to June 2, 2011,
17 Diamond was repeatedly advised: (1) that Shin did not sign any of
18 the petitions; (2) that Shin did not attend the pre-filing
19 briefing required by Bankruptcy Code §109(h); (3) that the
20 document indicating Shin had attended the §109(h) briefing was
21 forged; (4) that the Petitions were unsigned and the Electronic
22 Filing Declarations were obvious forgeries; (5) that the USB

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25 ⁵ Roelke's confusion was odd. The Unit occupied by USB was filled
26 with various machines and machine parts laying about a cluttered
27 floor, while that unit occupied by SMB was well organized, had
28 sewing machines on workstation tables, and sewing accoutrements
neatly about the premises. They were clearly two separate
businesses.

1 Board of Directors had not authorized the filing; (6) that UTI
2 was out of business and had not been operating for several years;
3 (7) that the UTI Board of Directors had not authorized the
4 filing; (8) that Shin, UTI and USB did not want to be in
5 bankruptcy proceedings but that these cases had been filed
6 without authorization by Choe; (9) that SMB, UTI, and USB had
7 been victimized by an unscrupulous attorney acting without
8 authority; and (10) that USB and SMB were different entities
9 operating in different parts of the building. (Complaint, ¶19 and
10 30; Counter Complaint, ¶171.)

11 In the Counter Complaint, Diamond acknowledges that he
12 became aware of these issues not later than April 15, 2011.
13 Diamond's only response, however, was to allow USB an
14 "opportunity to review its books and records in order to prepare
15 its schedules and statements of financial affairs".⁶ (Counter
16 Complaint, ¶171.) Through counsel, Diamond was advised that USB
17 was unwilling to ratify the fraudulent activities of Choe and
18 would not participate in the unauthorized bankruptcy process.

19 At no time, from the date of his appointment, did Diamond
20 seek authorization or instruction from the Court.

21 **D. SMB Files Chapter 11, Diamond Violates the Bankruptcy Code.**

22 In the face of Diamond's intransigence, SMB filed a
23 voluntary Chapter 11 petition on May 10, 2011. Notwithstanding

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26 ⁶ Diamond ignored what he was being told, refused to meet with
27 Shin or his counsel, refused to grant access to corroborating
28 information under his exclusive control and refused to examine
that information for himself.

1 the filing, Diamond concedes in the Counter Complaint that he
2 failed and refused to relinquish control over SMB's assets and
3 its books and records. Instead Diamond continued to reject
4 Shin's representations through counsel that SMB was not a party
5 to the UTI or USB cases and that Diamond had improperly seized
6 SMB's property.

7 Rather than looking at the documents under his control or
8 making even a minimal investigating of Shin's claims, and again
9 without seeking Court authorization or guidance, Diamond
10 improperly demanded that Shin provide "proof" of ownership.

11 SMB, through its attorney, provided what little information
12 he could, but Diamond considered this information "wholly
13 inadequate" to establish SMB's separate existence. (Counter
14 Complaint, ¶¶183-185.) Diamond then made it impossible to comply
15 with his demand by refusing access to SMB's books and records
16 under his exclusive possession and control. (Complaint, ¶¶40-47;
17 Counter Complaint, ¶¶183-185.)

E. Motion for Contempt for Violation of Automatic Stay.

18 On Tuesday, May 24, 2012, SMB - left with no alternative in
19 the face of Diamond's refusal to comply with Sections 362 and 543
20 of the Bankruptcy Code - filed a Motion asking the Court to hold
21 Diamond in contempt (the "Motion"). (Complaint, ¶50; Counter
22 Complaint, ¶186.) Even after the motion was filed, Diamond still
23 refused to turn over or provide access to SMB's assets.

24 On Tuesday, May 31, 2011 the Court entered an Order
25 dismissing the USB case. Even after the USB case was dismissed
26 Diamond still refused to turn over or provide access to SMB's
27 assets.

28 The keys were finally made available to SMB on June 2, 2011.

1 The Court continued the hearing on the Motion several times
2 finally setting it for October 4, 2011. The Motion was denied,
3 (Doc. 60) and SMB appealed. The BAP reversed on November 7, 2012
4 and remanded for further evidentiary hearings. (Docs. 63 and 34-
5 3.)

The Court conducted a hearing on December 5, 2012 to consider the BAP's Mandate. During that hearing the Court agreed with SMB's counsel that the BAP wanted the matter heard by complaint, rather than by motion. The Court further made it clear that this case would be handled in an expedited manner. Among other things, the Court specifically directed that the question of damages and all discovery related thereto be bifurcated and held until after the Court resolved the questions of liability and immunity.

The Complaint in this matter was filed on January 14, 2013. (Doc. 99). On February 7, 2013, Diamond filed his Answer and Counter Complaint against SMB for fraud, negligence, and abuse of process. (Doc. 6.)

III. LEGAL ARGUMENT

A. Applicable Legal Standard.

FRCP Rule 12, made applicable to bankruptcy cases by FRBP
Rule 7012, provides:

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: ... (6) failure to state a claim upon which relief can be granted

27 A motion based on FRCP Rule 12(b)(6) tests the legal
28 sufficiency of the claim or claims stated in the complaint.

1 (Strom v. United States, 641 F.3d 1051, 1067 (9th Cir. 2011); SEC
2 v. Cross Fin'l Services, Inc. 908 F.Supp. 718, 726-727 (CD CA
3 1995); Beliveau v. Caras, 873 F.Supp. 1393, 1395 (CD CA 1995);
4 United States v. White, 893 F.Supp. 1423, 1428 (CD CA 1995). For
5 purposes of Rule 12(b)(6), "claim" means a set of facts that, if
6 established, entitle the pleader to relief. (Bell Atlantic Corp.
7 v. Twombly, 550 U.S. 544, 555, (2007).)

8 A motion filed pursuant to FRCP Rule 12(b)(6) is proper when
9 the complaint fails to allege either: (a) A cognizable legal
10 theory; or (b) the absence of sufficient facts alleged under a
11 cognizable legal theory. (Shroyer v. New Cingular Wireless
12 Services, Inc. 622 F.3d 1035, 1041 (9th Cir. 2010); Hearn v. R.J.
13 Reynolds Tobacco Co. (D AZ 2003) 279 F.Supp.2d 1096, 1101; Coffin
14 v. Safeway, Inc. 323 F.Supp.2d 997, 1000 (D AZ 2004).) To survive
15 a motion to dismiss, the facts alleged must state a *facially*
16 *plausible* claim for relief. (Shroyer, supra, 622 F.3d at p. 1041;
17 Bell Atlantic, supra, 550 U.S. 544.)

18 A motion based on FRCP Rule 12(b)(6) may be directed at the
19 entire complaint or individual causes of action. (Godlewski v.
20 Affiliated Computer Services, Inc. 210 FRD 571, 572 (ED VA 2002);
Miceli v. Ansell, Inc. 23 F.Supp.2d 929, 931 (ND IN 1998).)

21 **B. Diamond Has Failed To State a Cause of Action for Fraud.**

22 In California, the elements of a fraud cause of action are:
23 (a) misrepresentation (false representation, concealment or
24 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
25 intent to defraud, i.e., to induce reliance; (d) justifiable
26 reliance; and (e) resulting damage. (Cal.Civ. Code §1709; Lazar
27 v. Superior Court, 12 Cal.4th 631, 638 (1996).)

28 Fraud actions are universally "disfavored" and subject to

1 particularity in pleading. In all averments of fraud or mistake,
2 the circumstances constituting fraud or mistake shall be stated
3 “with particularity.” (FRCP 9(b); *Desaigoudar v. Meyercord*, 223
4 F.3d 1020, 1022-1023 (9th Cir. 2000); *Committee on Children’s*
5 *Television, Inc. v. General Foods Corp.* 35 Cal.3d 197, 216
6 (1983).)

7 Fraud is a charge “that is easily made but less often
8 substantiated. Fraud claims are subject to a stricter pleading
9 standard, because they involve a serious attack on the
10 defendant’s character”. (*Conrad v. Bank of America*, 45
11 Cal.App.4th 133, 156 (1996); *Children’s Television, supra*, 35
12 Cal.3d at p. 216; *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.
13 1985).)

14 The “particularity” requirement serves several purposes: (1)
15 it ensures that a defendant has sufficient information to
16 formulate a defense by providing adequate notice of both the
17 nature and grounds of the claim; (2) it reduces the number of
18 frivolous suits brought solely to extract settlements; (3) it
19 eliminates fraud actions in which all the facts are learned after
20 discovery; and (4) it provides an increased measure of protection
21 for a defendant’s reputation. (*Harrison v. Westinghouse Savannah*
22 *River Co.* 176 F.3d 776, 784 (4th Cir. 1999); *Tuchman v. DSC*
23 *Communications Corp.* 14 F.3d 1061, 1067 (5th Cir. 1994).)

24 This rule is designed “to discourage a ‘sue first, ask
25 questions later’ philosophy”. (*Pirelli Armstrong Tire Corp.*
26 *Retiree Med. Benefits Trust v. Walgreen Co.* 631 F.3d 436, 441
27 (7th Cir. 2011).) “By requiring the plaintiff to allege the who,
28 what, where, and when of the alleged fraud, the rule requires the
 plaintiff to conduct a pre-complaint investigation in sufficient

1 depth to assure that the charge of fraud is responsible and
2 supported, rather than defamatory and extortionate." (*Ackerman v.*
3 *Northwestern Mut. Life Ins. Co.* 172 F.3d 467, 469 (7th Cir.
4 1999).) As one court has stated, in fraud cases "the who, what,
5 when, and where must be laid out before access to the discovery
6 process is granted." (*Williams v. WMX Technologies, Inc.* 112 F.3d
7 175, 178 (5th Cir. 1997).)

8 Though somewhat obscured by the fact that Diamond makes no
9 effort to track the elements of a fraud claim, Diamond's cause of
10 action is defective in nearly every respect. Nowhere does
11 Diamond allege any specific "misrepresentation" by SMB.⁷ To
12 paraphrase the Court in *Williams*, Diamond has failed to plead any
13 who, what, when or where. (*Williams v. WMX Technologies, Inc.,*
14 *supra*, 112 F.3d at p. 178.)

15 Diamond seems to be searching for scienter in paragraph 193
16 of the Counter Complaint Diamond where he alleges that:

17 "SMB ... caused Union Trim and USB to continued
18 unauthorized and illegal operations with
19 potential dissipation of personal property
post-petition, thereby exposing Diamond ... to
potential liability from the Secured Creditor
and other legitimate creditors."

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24 ⁷ Diamond has failed to allege a single misrepresentation in any
25 of the factual allegation. Instead, Diamond generally asserts,
26 without specificity, that "misrepresentations" exist in pleadings
filed in the USB, UTI and Shin cases. Even if Diamond were
27 correct (and he is not), misrepresentations contained in Court
pleadings may be a basis for relief under FRBP 9011, not a claim
28 for fraud. Diamond has not sought redress under Rule 9011, nor
has he complied with the "safe harbor" provisions of that Rule.

1 Apart from the fact that Diamond alleges no facts to support this
2 conclusion, the allegation does not sound in fraud. There is no
3 alleged misrepresentation, no reliance, no intent to defraud
4 Diamond, and no claim of damage. (Cal.Civ. Code §1709; *Lazar v.*
5 *Superior Court, supra*, 12 Cal.4th at p. 638.)

6 The following paragraph suffers the same deficiencies.
7 Diamond alleges that:

8 SMB intentionally and with full knowledge thereof,
9 lied to Diamond as to the circumstances surrounding
10 the bankruptcy filings in an effort to persuade
11 Diamond to take unwarranted action with respect to
12 property as to which Diamond was responsible
...thereby exposing Diamond to potential liability
from the Secured Creditor and other legitimate
creditors.

13 (Counter Complaint, ¶ 194.) There is no "misrepresentation" –
14 let alone one pled with particularity as required by FRCP Rule 9.

15 Diamond relies instead on broad sweeping general statements
16 of falsity that do not comply with the specificity requirement
17 lot alone comport with what actually occurred. (FRCP 9(b);
18 *Desaigoudar v. Meyercord, supra*, 223 F.3d at pp. 1022-1023;
19 *Williams v. WMX Technologies, Inc., supra*, 112 F.3d at p. 178;
20 *Children's Television, supra*, 35 Cal.3d at p. 216.)

21 Finally, Diamond concedes that he has not incurred **any**
22 damages. Instead he alleges that SMB's conduct has "exposed]
23 Diamond to **potential** liability from the Secured Creditor and
24 other legitimate creditors." (Counter Complaint, ¶¶ 193-194.
25 Emphasis added.) In order to assert a viable claim, a party must
26 alleged that he has **incurred** damages – the potential or
27 possibility of future harm is insufficient. (Cal.Civ. Code
28 §1709; *Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638.)

1 Diamond's fraud claim should be dismissed.

2 **C. Diamond has Failed to State a Claim for Negligence.**

3 In order to state a claim for negligence, a party must plead
4 and prove four elements: : (1) a duty running from the defendant
5 to the plaintiff; (2) a breach of that duty; (3) a causal
6 connection between the breach of duty; and (4) the damages
7 incurred by the plaintiff flowing from that breach. (See, e.g.,
8 *Nichols v. Keller*, 15 Cal.App.4th 1672, 1682 (1993); *Budd v.*
9 *Nixen*, 6 Cal.3d 190, 195 (1972); *Laird v. Blacker* 2 Cal.4th 606,
10 620 (1992).) To support a finding of negligence, a plaintiff must
11 show that the defendant owed a duty to the plaintiff to use care,
12 that he or she breached that duty, and that the breach was the
13 actual cause of the resulting injury. (*Nally v. Grace Community*
14 *Church*, 47 Cal.3d 278 (1988); see also *Mitchell v. Gonzales*, 54
15 Cal.3d 1041 (1991).) "Abstract negligence" is insufficient to
16 support a judgment against a defendant; instead, there must be
17 substantial evidence of a causal connection between a defendant's
18 negligent acts or omissions and plaintiffs' injuries. [*Cabral v.*
19 *Ralphs Grocery Co.*, 101 Cal. Rptr. 3d 474 (Cal. App. 4th Dist.
20 2009), review granted and opinion superseded, 2010 WL 391415
(Cal. 2010).])

21 Diamond deals very curtly with the first issue; the
22 existence of any duty owed by SMB to Diamond. (Counter
23 Complaint, ¶199.) The failure to address this element is
24 understandable - there was none. This is particularly true where
25 the bankruptcy case was fraudulently filed by an intervening
26 third party - Choe.

27 Generally speaking the law imposes two categories of duties:
28 the duty to use ordinary care in conducting activities from which

1 harm might reasonably be anticipated (Cal. Civ. Code, § 1714
2 subd. (a)); and duties based on a relationship between parties -
3 such as an attorney-client, or other professional relationship,
4 where the duty arises as a result of that relationship. (*Nichols*
5 *v. Keller*, *supra*, 15 Cal.App.4th at p. 1682; *Budd v. Nixen*,
6 *supra*, 6 Cal.3d 190.)

7 In this case, SMB was conducting normal business operations
8 when Diamond entered its business premises, without warning or
9 cause, and ejected all of SMB's employees utilizing the title and
10 authority of his office to do so. If anyone had a duty of
11 ordinary care in this case, it was Diamond who failed to exercise
12 that duty before taking action, Diamond who failed to seek any
13 guidance or instruction from the Court and Diamond who failed to
14 take any action to mitigate the harm he caused after being
15 informed of the true facts.

16 Nor was there any relationship between SMB and Diamond. SMB
17 was not a party to either of the bankruptcy proceedings in which
18 Diamond was the trustee. Other than having common ownership, SMB
19 had no connection whatsoever to USB. SMB's only connection to
20 UTI was SMB's contractual acquisition of UTI's assets several
21 years earlier. In short, there was no relationship which could
22 support a duty of the type required. Diamond cannot simply
23 manufacture such a duty by fiat.

24 Even if this Court were to find such a duty, the allegations
25 do not support a negligence claim.

26 Diamond alleges that SMB:

27 [N]egligently created the circumstances
28 which ... caused Union Trim and USB to become
involved in proceeding under the Bankruptcy
Code and then allowed Union Trim and USB to

1 continued unauthorized and illegal
2 operations with potential dissipation of
3 personal property post-petition, thereby
4 exposing Diamond ... to potential liability
5 from the Secured Creditor and other
6 legitimate creditors."

7 (Counter Complaint, ¶200.) Even assuming this bizarre allegation
8 were true, any pre-bankruptcy duty SMB "breached" would have
9 been to UTI and USB - not to Diamond.

10 Moreover, as with his claim for fraud, Diamond has conceded
11 that he has *not incurred any damages* - only that the "potential"
12 for damages. (Counter Complaint, ¶¶200, 202.) It is well
13 established that a negligent act and breach of duty - no matter
14 how extreme or egregious - will not give rise to a cause of
15 action for negligence where the party seeking recovery was not
16 "actually" injured by that negligent act. (*Budd v. Nixon, supra,*
17 6 Cal.3d at p. 201.) In this case, Diamond has conceded that he
18 was not injured by the alleged negligence of SMB. As such, his
19 claim fails as a matter of law and should be dismissed.

20 **D. Diamond Has Failed to Plead a Claim for Abuse of Process.**

21 One who uses or abuses a legal process, whether criminal or
22 civil, for a purpose other than that for which it is designed is
23 potentially liable for the tort of abuse of process. (*Oprian v.*
24 *Goldrich, Kest & Associates*, 220 Cal App 3d 337 (1990 4th Dist.).)
25 The two fundamental elements of abuse of process are: (1) an
26 ulterior purpose, (2) and a willful act in the use of the process
27 that is not proper in the regular conduct of the proceeding.
28 (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* 42 Cal 3d 1157 (1986).)

29 In his third cause of action, Diamond maintains that the
30 filing of the bankruptcy petitions by UTI, USB, and SMB, along

1 with virtually all the motions filed in those proceedings,
2 constitute an "abuse of process of this Court" and that SMB
3 should be required to pay Diamond damages according to proof.
4 (Counter Complaint, ¶200.) Diamond clearly has no understanding
5 of this cause of action.

6 First, filing and maintaining an action - even where
7 improper - does not give rise to the tort of abuse of process.
8 As observed by the California Supreme Court:

9 The relevant California authorities
10 establish, however, that while a defendant's
11 act of improperly instituting or maintaining
12 an action may, in an appropriate case, give
13 rise to a cause of action for malicious
prosecution, the mere filing or maintenance
of a lawsuit—even for an improper purpose—is
not a proper basis for an abuse of process
action.

14 *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma,*
15 *Inc.* 42 Cal.3d 1157, 1169 (1986).)⁸
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20 ⁸ In reaching this conclusion, the Court further noted that the
21 "overwhelming majority of out-of-state precedents have reached
the same conclusion. (See, e.g., *Bird v. Rothman* (1981) 128 Ariz.
22 599, 627 P.2d 1097, 1100; *Brody v. Ruby* (Iowa 1978) 267 N.W.2d
902, 905; *Bickel v. Mackie* (N.D.Iowa 1978) 447 F.Supp. 1376,
1382-1383; *Baker Driveaway Co., Inc. v. Bankhead Enterprises*
(E.D.Mich.1979) 478 F.Supp. 857, 860; *Farmers Gin Company v. Ward*
(1964) 73 N.M. 405, 389 P.2d 9, 11-12; *Drago v. Buonagurio*
(Sup.Ct.1977) 89 Misc.2d 171, 391 N.Y.S.2d 61, 62, affd. (1978)
46 N.Y.2d 778, 413 N.Y.S.2d 910, 386 N.E.2d 821; *Petrou v. Hale*
(1979) 43 N.C.App. 655, 260 S.E.2d 130, 133-134; *Martin v. Trevino*
(Tex.Civ.App.1978) 578 S.W.2d 763, 769; contra, *Bull v. McCuskey*
(1980) 96 Nev. 706, 615 P.2d 957, 960.); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, supra, 42 Cal.3d 1157, 1169.

1 In order to satisfy the tort of abuse of process, the second
2 element requires a willful act in the use of the process *not*
3 proper in the regular conduct of the proceeding." (*Oren Royal*
4 *Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, *supra*,
5 42 Cal.3d at p. 1169, quoting *Templeton Feed & Grain v. Ralston*
6 *Purina Co.* 69 Cal.2d 461, 466 (1968). Emphasis added.)

7 In *Templeton Feed and Grain v. Ralston Purina Co.* 69 Cal.2d
8 461, 465-66 (1968), the California Supreme Court elaborated on
9 the "willful act" requirement as:

10 *Some definite act or threat not authorized by the*
11 *process, or aimed at an objective not legitimate in the*
12 *use of the process, is required; and there is no*
13 *liability where the defendant has done nothing more*
14 *than carry out the process to its authorized*
15 *conclusion, even though with bad intentions. The*
16 *improper purpose Usually takes the form of coercion to*
17 *obtain a collateral advantage, not properly involved in*
18 *the proceeding itself, such as the Surrender of*
19 *property or the payment of money, by the use of the*
20 *process as a threat or a club. There is, in other*
21 *words, a form of extortion, and it is what is done in*
22 *the course of negotiation, rather than the issuance or*
23 *any formal use of the process itself, which constitutes*
24 *the tort.*"

25 (Italics in opinion.)

26 In this case, Diamond has alleged no "threat", "improper
27 objective", or anything else that would satisfy the element of
28 "willful act". Instead, he has alleged that virtually all the
pleading filed in the UTI, USB and Shin bankruptcy cases were

1 improper because they "unnecessarily multiplied proceedings" and
2 this should require SMB to pay damages. This is simply not abuse
3 of process nor any other cognizable claim for which Diamond may
4 seek relief. Further, it ignores the fact that none of these
5 cases was filed, or authorized by the debtors involved.

6 It is, frankly, not uncommon in any litigation for one party
7 to consider that his opponent may be filing excessive or
8 unnecessary pleadings. Under the "Diamond Rule", any attorney
9 who subjectively feels aggrieved by this process would have an
10 abuse of process claim.⁹ Fortunately this is simply not the law
11 since courts would be clogged with such claims going back and
12 forth between litigants, each claim giving rise to the next.

13 Finally, apart from the other fatal defects, this cause of
14 action is also time barred as a matter of law. In California,
15 because abuse of process is considered an injury to the person,
16 the applicable statute of limitations is one year. (Cal. Code
17 Civ. Proc., § 340, subd. (3); *Cantu v. Resolution Trust Corp.* 4
18 Cal.App.4th 857, 886-87 (1992).) The limitations period begins to
19 run when the abuse of process occurs. (*McFaddin v. H.S. Crocker*
20 Co.

21 219 Cal.App.2d 585, 590 (1963).) Nor is Bankruptcy Code §108
22 applicable since claims based on filings in the Shin, USB and UTI
23 bankruptcy cases necessarily arose AFTER those cases were filed.

24
25 ⁹ By way of illustration, a reasonable attorney could conclude
26 that this Counter Complaint was filed solely to increase fees and
27 costs in a matter that was intended solely to comply with the
28 BAP's mandate to conduct an evidentiary hearing. Based on such a
conclusion and using the Diamond Rule, SMB would have a claim for
abuse of process against Diamond.

1 According to the Counter Complaint, virtually everything
2 filed in the UTI, USB, and SMB actions was somehow intended to
3 vex Diamond and confuse the Court. (Counter Complaint, ¶200.)
4 Instead of seeking clarification or guidance from the Court,
5 Diamond chose to "go it alone". His decision to do so has
6 exposed him to liability and he must bear the consequences of
7 that decision. *Leonard v. Vrooman*, 383 F.2d 556 (9th Cir. 1967)
8 cert. den. 390 U.S. 925, 88 S.Ct. 856, 19 L.Ed.2d 985 (1968)).

9 The USB case was dismissed by Court Order on May 31, 2011.
10 The UTI case was dismissed on July 28, 2011. (Counter Complaint,
11 ¶¶148, 177.) The Shin case was dismissed on May 2, 2011. Any
12 abuse of process claims relating to those actions must have been
13 filed no later than May 2, 2012, May 31, 2012 and July 28, 2012.
14 This Counter Complaint was not filed, however, until February of
15 2013.¹⁰

IV. CONCLUSION

16 By this Counter Complaint, Diamond seeks to transform what
17 was intended by the BAP and this Court to be a rather simple and
18 straightforward evidentiary hearing into a morass of litigation.
19 Diamond's goals are to obfuscate the issues and improperly
20 increase the costs of litigation for SMB.

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24 ¹⁰ Diamond cannot maintain any claim for abuse of process as to
25 the SMB case as that matter is ongoing. There are certain
26 procedural safeguards, such as Rule 11 sanctions, for improper
27 filings that Diamond can utilize if he believes that pleadings in
28 this case were improperly filed. But his claim as to abuse of
process would not accrue until the end of the litigation. (*Kappel
v. Bartlett* 200 Cal.App.3d 1457, 1467 (1988); *Cantu v. Resolution
Trust Corp.*, *supra*, 4 Cal.App.4th at pp. 886-87.)

This case is very simple. Diamond, a Trustee acting in excess of his authority, seized property which did not belong to the estate under his administration. When the error was brought to his attention and convinced of his own infallibility and invulnerability, Diamond refused to investigate, failed to acknowledge and correct any error and failed to seek Court guidance or instruction. No one made Diamond seize the assets except Diamond. No one prevented Diamond from doing an investigation except Diamond. No one prevented Diamond from seeking Court guidance except Diamond. Diamond's efforts to blame everyone around him should be recognized for what they are - finger pointing and obfuscation.

Diamond filed a Counter Complaint that, on its face, fails to present either cognizable legal theories or sufficient facts to support cognizable legal theories. The facts and legal arguments presented fail to allege facially plausible claims for relief. This Motion should be granted and the Counter Complaint should be dismissed without leave to amend.

By:

KEVIN S. LACEY
Attorneys for SMB GROUP, INC.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
206 North Jackson Street, Suite 201, Glendale CA 91206

A true and correct copy of the foregoing document entitled (*specify*): **NOTICE OF MOTION AND MOTION FOR ORDER DISMISSING COUNTER COMPLAINT, MEMORANDUM OF POINTS AND AUTHORITIES** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 3/14/13, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Howard Kollitz HKollitz@DGDK.Com, DanningGill@gmail.com
- David B Lally davidlallylaw@gmail.com
- Steven J Schwartz sschwarz@dgdk.com, DanningGill@gmail.com
- David A Tilem davidtilem@tilemlaw.com, malissamurguia@tilemlaw.com; dianachau@tilemlaw.com; joanfidelson@tilemlaw.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) 03/14/2013, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Barry Russell, U.S. Bankruptcy Court, 255 E. Temple Street, Suite 1660, Los Angeles, CA 90012
Stuart Simone, GWC Law Group PC, 3699 Wilshire Blvd., Suite 720, Los Angeles, CA 90010
Debtor: SMB Group, Inc., 2635 S. Main Street., #A, Los Angeles, CA 90007

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) , I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

03/14/2013

Diana Chau

Date

Printed Name

Signature